No. 82-1213

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IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

PAGE

Point One—All of the Issues Raised by the Petitioner Are Properly Before This Court 1

A. There Are No Adequate and Independent State Grounds for the Decision of the Court Below 2

B. The Record Is Sufficient for This Court to Determine the Issues Presented 4

Point Two—Admission of Evidence of the Defendant's Declaration Concerning the Location of His Revolver Would Be Consistent With Previous Decisions of This Court 6

Conclusion 12

TABLE OF AUTHORITIES

PAGE

Cases:

Dewey v. Des Moines, 173 U.S. 193 (1898) 5

Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 860 (1980) 11

Illinois v. Gates, —— U.S. ——, 103 S. Ct. 2317 (1983) 5

Michigan v. Long, —— U.S. ——, 103 S. Ct. 3469 (1983) 2, 4
Michigan v. Tucker, 417 U.S. 433 (1974) 5
Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Orozco v. Texas, 394 U.S. 324 (1969) 6, 10

People v. Toler, 45 Mich. App. 156, 206 N.W.2d 253 (1973) 8
Pope v. State, 478 P.2d 801 (Alaska 1977) 7

Rhode Island v. Innis, 446 U.S. 291 (1980) 6, 8–10

State v. Lane, 467 P.2d 304 (Wash. 1970) 8
State v. Levy, 229 So.2d 220 (La. 1979) 7

United States v. Bennett, 626 F.2d 1309 (5th Cir. 1980), *cert. denied*, 409 U.S. 1092 (1981) 9–10
United States v. Castellana, 500 F.2d 325 (5th Cir. 1974) 7, 11
United States v. Ganter, 436 F.2d 369 (7th Cir. 1970) 8
United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd* 672 F.2d 115 (1982) 9

Webb v. Webb, 451 U.S. 493 (1981) 5

PAGE

Constitutional and Statutory Provisions:

New York Criminal Procedure Law Sections 710.20 (1); 710.20(3); 710.20(4); 60.45 3
United States Constitution, Fifth Amendment 3
United States Constitution, Fourteenth Amendment 3

Court Rule:

Rule 40(d)(2) of the Supreme Court of the United States 2

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POINT ONE

All of the Issues Raised by the Petitioner Are Properly Before This Court [Answering Respondent's Point I, p. 37; Point II, pp. 45-55; and Point III, pp. 76-81].

The respondent contends that several of the issues raised by the petitioner are not properly before this Court because there are independent and adequate state grounds for the decision of the Nw York Court of Appeals and be-

cause this Court lacks an adequate record on which to decide the case. We submit that he is incorrect in both regards.

At the outset, it should be noted that the only contention regarding the reviewability of the questions presented in the respondent's brief in opposition to the petition for a writ of *certiorari* was the assertion that the State failed to preserve for review the argument that his gun would inevitably have been discovered even if he had not indicated its location. Since Rule 40(d)(2) of this Court provides that briefs on the merits "may not raise additional questions or change the substance of the questions already presented," any other question regarding the reviewability of the State's claims should not be considered by the Court.

Quite apart from the respondent's failure to previously raise the contentions, however, we submit that they are without merit.

A. There Are No Adequate and Independent State Grounds for the Decision of the Court Below.

Respondent recognizes that this Court has recently held in *Michigan* v. *Long*, —— U.S. ——, 103 S. Ct. 3469, 3476 (1983) that when "a state court decision fairly appears to rest on federal law, or to be interwoven with the federal law" the Court will "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so" unless "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." Respondent attempts to distinguish *Long*, however, on the ground that, in the

instant case, "the state court opinions below make no reference to the authority for excluding the primary or derivative evidence and do not invoke any federal law with respect thereto" (brief, p. 54). In fact, however, the Court of Appeals specifically based its determination that the lower court had properly suppressed both the defendant's statement and his gun on its opinion that he had not "been given the pre-interrogation warnings to which he was constitutionally entitled" (52a).* Since it has never been held as a matter of New York State constitutional law that a defendant is entitled to pre-interrogation warnings, this could only have been a reference to this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and to the Fifth and Fourteenth Amendments to the United States Constitution. Any remaining ambiguities regarding the federal basis of the decision of the Court of Appeals can be resolved by reference to the dissenting opinion which specified *Miranda* as that basis (54a), the decision of the hearing court, which also specified *Miranda* as its basis (43a), and the defendant's initial motion papers which requested "a hearing to determine whether or not the admission made by defendant was voluntary and whether the weapon seized thereby was properly obtained under the Constitution of the United States" (8a). The defendant's citation of New York statutes authorizing motions to suppress statements and derivative physical evidence (brief, pp. 52-54) as the bases of the Court of Appeals decision in this case [New York Criminal Procedure Law Sections 710.20(1); 710.20 (3); 710.20(4); 60.45] is erroneous both because these are procedural sections not designed to confer substantive rights and because the Court nowhere mentioned them in its opinion.

* Numerical references are to pages of the joint appendix.

Since the decision of the Court of Appeals "fairly appears to rest on federal law, or to be interwoven with the federal law" (*Michigan* v. *Long, supra,* 103 S. Ct. at 3476), it was incumbent upon that Court to make clear its reliance on any independent and adequate state ground. The only portion of the Court's opinion subject to that interpretation, however, is its comment that "so far as appears from the record" the State did not advance at the suppression hearing the theory that there were exigent circumstances posing a risk to the public safety at the time of the questions about the location of the gun (52a). Respondent contends that this amounts to a holding that no determination could be made with regard to the claim and that this holding constitutes an independent and adequate state ground for the Court's decision (brief, p. 37). However, the Court had already made a determination of this question in the preceding sentence, stating that "there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern" (52a). It is this determination—that no exigent circumstances were established—which the State is now asking this Court to review. (See the Petition for a Writ of *Certiorari,* pp. 1, 4, 8-9.)

B. The Record Is Sufficient for This Court to Determine the Issues Presented.

In the court below, the State sufficiently pressed each of the questions presented to enable this Court to reach a determination of them. By opposing the respondent's motion to suppress statements and physical evidence, the State implicitly asserted both that the statements were admissible

and that, in any event, the derivative physical evidence need not be suppressed. From the first appellate level on, the State has explicitly argued both that the defendant's statement, "The gun is over there," was properly elicited and that, even if it be determined that it was not, the gun need not be suppressed as a fruit of that violation because it would have inevitably been discovered absent that statement. Thus, respondent's repeated assertion that the State never raised the issue of the admissibility of derivative evidence notwithstanding a *Miranda* violation is simply erroneous (brief, pp. 45, 47, 55). The only argument added in this Court has been that the derivative evidence is admissible on the authority of *Michigan* v. *Tucker*, 417 U.S. 433 (1974), because the defendant's statement was voluntary, the police officer acted in good faith, and the detriments of exclusion outweigh the benefits (Brief for the Petitioner, Point IIA). This argument merely provides another reason why *Miranda* should not be held to require exclusion of the derivative evidence in the case at bar. As this Court held in *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1898), "Parties are not confined here to the same arguments which were advanced in the court below upon a Federal question there discussed." Respondent's citation of *Illinois* v. *Gates*, —— U.S. ——, 103 S. Ct. 2317 (1983) in this regard (brief, pp. 46-50, 55) is inapposite inasmuch as in *Gates*, the issue of the scope of the exclusionary rule, as distinct from the issue of whether a constitutional violation had occurred, had never been raised in the State court system at all (*id.* at 2323). [*Cf. Webb* v. *Webb*, 451 U.S. 493 (1981).]

The record of the instant case fully supports our position on each issue raised. If this Court determines that the

record is insufficient to support our position, it should decide the issues against us on the merits since it is our burden to establish that the defendant's statements were voluntary or that the derivative evidence was admissible notwithstanding any *Miranda* violation. There is simply no reason for this Court not to decide the issues presented.

POINT TWO

Admission of Evidence of the Defendant's Declaration Concerning the Location of His Revolver Would Be Consistent With Previous Decisions of This Court [Answering Respondent's Point I, pp. 15-44].

In its brief for the petitioner, the State argued that the New York Court of Appeals improperly excluded evidence of the defendant's statement, "The gun is over there," as being elicited in violation of his federal constitutional rights where the police had probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket. Respondent now contends that such a holding would "abrogate" *Miranda* v. *Arizona, supra,* upset the clarity of the objective tests for determining whether a person is subjected to interrogation which are set forth in *Miranda* and *Rhode Island* v. *Innis,* 446 U.S. 291 (1980), and overrule *Orozco* v. *Texas,* 394 U.S. 324 (1969) (brief, pp. 18, 26, 31, 38). We submit that it would do none of these things.

Miranda exempted from its definition of custodial interrogation "general on the scene questioning as to facts surrounding a crime" (384 U.S. at 477). While *Miranda*

left open the issue of whether questions asked of a person in custody can constitute such on-scene questioning, numerous subsequent cases have held that they can (see Brief for the Petitioner, pp. 13-14). Specifically, questions concerning the presence of weapons in the immediate vicinity of a police-citizen encounter have almost always been held not to constitute interrogation under *Miranda*, both because they are considered non-investigatory in nature and because they are reasonably prudent measures to neutralize the threat of physical harm to either the police officer or others present (Brief for the Petitioner, pp. 14-15). To decide the instant case consistently with those referred to would be neither an abrogation of the holding of *Miranda* nor an obfuscation of its reasoning. Rather, it would be a reasonable interpretation of the meaning of that case.

Conceding that there are some circumstances which "may justify a different result" from that which he believes should obtain in the instant case, respondent attempts to distinguish some of those cases where "a different result" was, in fact, reached (brief, p. 35). For example, he attempts to distinguish *United States* v. *Castellana*, 500 F.2d 325 (5th Cir. 1974) on the ground that the defendant in that case had not been restrained at the time of the question about the gun. He ignores, however, both that in that case the question was considered proper despite a specific finding that the officers had not felt physically threatened and that the arrest had taken place in an apartment where the danger of harm to either the officer or the public was less than in a building open to the public such as a supermarket (*id.* at 326-27). Similarly, he attempts to distinguish both *State* v. *Levy*, 229 So.2d 220 (La. 1979) and *Pope* v. *State*, 478 P.2d 801 (Alaska 1977) on the ground that the questioning

occurred "before effectuating an arrest" despite the fact that both cases made clear that the questions concerning the locations of the weapons did not constitute interrogation regardless of the degree of control exerted by the police. Respondent's difficulty in distinguishing these cases stems from his failure to recognize their common thread—that a question regarding the location of a weapon in the immediate vicinity of a police-citizen encounter is, objectively speaking, a reasonably prudent measure not proscribed by *Miranda*. This thread is seen even more clearly in *United States* v. *Ganter*, 436 F.2d 369, 370 (7th Cir. 1970), *State* v. *Lane*, 467 P.2d 304 (Wash. 1970) and *People* v. *Toler*, 45 Mich. App. 156, 206 N.W.2d 253 (1973), all of which are cited on page 16 of the brief for the petitioner and none of which are discussed in the brief for the respondent. In *Ganter*, the Court found that the defendant "obviously did not have the gun on him at the time of the question as to its location"; in *Lane*, the defendant was handcuffed and surrounded by police officers; and in *Toler*, the defendant had been shot, arrested, and patted down for a weapon. In each case, however, the officer's question was deemed to have been reasonably prudent under the circumstances. Quite obviously, it is the nature of the question, rather than the degree of control exerted by the police which has been deemed dispositive.

After warning that admission of his statement would upset the clarity of *Rhode Island* v. *Innis*, *supra*, respondent proceeds to interpret *Innis* in such a way as to negate any clarity which might have inhered in that decision. It bears repeating at this point that the holding in *Innis* was that, in addition to express questions, the term "interrogation"

under *Miranda* encompasses the "functional equivalent" of express questioning, which was defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 U.S. at 361). Respondent first applies the "reasonably likely" standard to an express question (brief, pp. 24-25), despite the plain language of *Innis* to the effect that that was intended to apply only to words or conduct short of express questioning [see, *United States* v. *Hinckley*, 525 F. Supp. 1342, 1355 (D.D.C. 1981), *aff'd* 672 F.2d 115 (1982)]. Second, he equates the phrase "normally attendant to arrest and custody" with "routine administrative questioning" (incorrectly asserting that *amicus* does likewise), and then defines the latter phrase as any question which is not likely to elicit an incriminating response (brief, pp. 27-31). This circular interpretation, of course, renders the parenthetical phrase "other than those normally attendant to arrest and custody" superfluous.

Respondent, then, would interpret *Innis* as holding that any words or conduct on the part of a police officer, without exception, that the police should know are reasonably likely to elicit an incriminating response constitute interrogation under *Miranda*. While benefitting from a superficial clarity, this is simply not the holding of *Innis* as it was written.

In its brief for the petitioner, the State analogized the instant case to *United States* v. *Bennett*, 626 F.2d 1309, 1313 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981), which held that the statement of one police officer to the other

that "there's a gun in the car" did not constitute interrogation because it was "normally attendant to arrest and custody" of the defendant (brief, p. 12). Respondent attempts to distinguish *Bennett* on the ground that the police officer's statement "was neither questioning nor its functional equivalent" (brief, p. 26, n. 6). While this is true, the *Bennett* court specifically found that the police statement was "normally attendant," and therefore not the functional equivalent of express questioning regardless of whether it was likely to elicit an incriminating response (626 F.2d at 1312).

Respondent also argues that questions about the location of weapons are not normally attendant to arrest and custody because the conversation at issue in *Innis* was about a weapon and the Court did not there decide that the police conduct was "normally attendant" (brief, p. 27). This argument ignores the fact that, in *Innis*, the Court determined that the police conduct was not reasonably likely to elicit an incriminating response. Having made that determination, there was no need to decide the issue of whether it was normally attendant to arrest and custody. For the same reason, the fact that *Innis* did not discuss the safety of the public does not preclude the State from raising that consideration in the instant case, as respondent seems to imply (brief, pp. 37-38).

Orozco v. *Texas*, 394 U.S. 324 (1969) does not require suppression of the evidence in the case at bar. In *Orozco*, the police went to the defendant's house some time after a murder at a restaurant for the purpose of investigating his involvement in the murder (*id.* at 326). Surrounding the defendant, they asked a series of clearly investigatory ques-

tions, only one of which involved a weapon. They had no reason to suspect that the defendant was armed at that moment or that any member of the public was likely to find the weapon. In contrast, in the case at bar, Officer Kraft had reason to believe that the defendant's gun was in the immediate vicinity of where he was standing in the supermarket. Contrary to respondent's contention (brief, p. 14), there is no evidence in the record that the respondent and the officer were alone at the scene of the arrest. Faced with these difficult circumstances, Kraft acted prudently in asking only the single question directed toward the location of the gun prior to issuance of *Miranda* warnings (17a-21a, 34a-36a).

In arguing for a rigid application of *Miranda*, respondent extensively quotes from *Harryman* v. *Estelle*, 616 F.2d 870, 873-874 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 860 (1980). *Harryman*, however, specifically stated that if there is a "sufficiently compelling noninvestigatory purpose" for a question, it would not constitute interrogation under *Miranda*, and it specified the presence of firearms as a question with such a purpose, citing *United States* v. *Castellana*, *supra*. Accordingly, *Harryman* is a good example of how permitting police to question arrestees about the likely presence of a weapon in the immediate vicinity of the arrest is not inconsistent with rigid and zealous protection of the defendant's rights.

Conclusion

For the Reasons Previously Stated It is Respectfully Requested That the Order of the Court of Appeals of the State of New York Be Reversed.

Respectfully submitted,

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